

FEDERAL CIRCUIT COURT OF AUSTRALIA

PHARIKAN v MINISTER FOR IMMIGRATION & ANOR [2018] FCCA 1453

Catchwords:

MIGRATION – Application for review of Administrative Appeals Tribunal decision – allegation of an apprehension of bias – whether the Tribunal applied the wrong test – whether the Tribunal failed to take into account relevant considerations – no jurisdictional error – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.5CB, 476

Migration Regulations 1994 (Cth), regs.1.09A, 1.15A, sch. 2, cl.801.221

Cases cited:

Re Refugee Review Tribunal; Ex parte H [2001] HCA 28; (2001) 179 ALR 425; (2001) 75 ALJR 982

MZAEU v Minister for Immigration and Border Protection [2016] FCAFC 100; (2016) 70 AAR 22

SZRUI v Minister for immigration, Multicultural Affairs and Citizenship [2013] FCAFC 80

Minister for Immigration and Multicultural Affairs v SZGMF [2006] FCAFC 138

NADH of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 328, (2004) 214 ALR 264

Immigration and Citizenship v SZQHH [2012] FCAFC 45; (2012) 200 FCR 223; (2012) 125 ALD 481

VFAB v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 872

AZAEY v Minister for Immigration and Border Protection [2015] FCAFC 193; (2015) 238 FCR 341

Re Refugee Tribunal; Ex Parte Aala [2000] HCA 57; (2000) 204 CLR 82; (2000) 62 ALD 285

SCAA v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCA 668

Re Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic [1990] FCA 22

Truong v Minister for Immigration & Anor [2018] FCCA 497

He v Minister for Immigration and Border Protection [2017] FCAFC 206

Applicant:

PHINIT PHARIKAN

First Respondent: MINISTER FOR IMMIGRATION &
BORDER PROTECTION

Second Respondent: ADMINISTRATIVE APPEALS
TRIBUNAL

File Number: SYG 259 of 2016

Judgment of: Judge Nicholls

Hearing date: 12 April 2018

Date of Last Submission: 12 April 2018

Delivered at: Sydney

Delivered on: 8 June 2018

REPRESENTATION

Solicitors for the Applicant: Mr R Turner of Turner Coulson
Immigration Lawyers

Solicitors for the Respondents: Mr W Sharpe of Minter Ellison

ORDERS

- (1) The application made on 8 February 2016 and amended on 12 April 2018 is dismissed.
- (2) The applicant pay the first respondent's costs set in the amount of \$6,825.
- (3)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 259 of 2016

PHINIT PHARIKAN

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

1. This is an application made pursuant to s.476 of the *Migration Act 1958* (Cth) (“the Act”) on 8 February 2016 and amended on 12 April 2018 seeking review of the decision of the Administrative Appeals Tribunal (“the Tribunal”) made on 14 January 2016 which affirmed the decision of the Minister’s delegate (“the delegate”) to refuse the grant of a Partner (Residence) (Class BS) visa to Mr Phinit Pharikan.
2. The evidence before the Court is as follows:
 - a) A bundle of relevant documents filed and tendered by the Minister (“the Court Book” – “CB”, “RE1”).

- b) The affidavit of Mary Elinor Corkhill made on 9 September 2016 annexing a transcript (“T”) of the Tribunal hearing (no objection).
 - c) The affidavit of Raymond Charles Turner solicitor made on 29 March 2018 annexing handwritten notes (see below in relation to the relevant objections). I note that no reference was made by either party to the annexure to Mr Turner’s affidavit, so I did not have regard to it.
3. At the hearing before the Court leave was granted for Mr Pharikan to proceed by way of an amended application which had been filed on 29 March 2018. The grounds of the amended application are in the following terms:

“1. The Tribunal’s decision is affected by apprehended bias.

Particulars

a. The Tribunal continually faced away from the Applicant and his witnesses and concentrated on what was displayed on its computer.

b. The Tribunal stared at times at the Applicant and witnesses.

c. The Tribunal was disinterested in what the Applicant’s daughter was saying indicating that it had prejudged the application.

d. The Tribunal was informed that superannuation nominations have to be renewed at regular intervals and that if it wished to see the earlier nominations they could be provided. The Tribunal declined that invitation.

It then went on to make a finding adverse to the Applicant that

‘...the applicant’s superannuation is dated December 2015 and is effective from November 2015, well after the parties claim to have commenced their relationship.’

2. The Tribunal applied the wrong test

Particulars

a. The Tribunal was only required to determine whether the Applicant and his spouse were in a genuine and continuing relationship at the time of its decision. The Tribunal referred principally to matters in respect of which the First Respondent had already made a decision that they were in a genuine and continuing relationship at the time of the application.

3. The Tribunal failed to consider relevant consideration and, thereby, failed to carry out its statutory duty to review the application.

Particulars

a. The Tribunal failed to consider all of the considerations set out in the Migration Regulations reg.1.15A, particularly 1.15A(3)(b)(i),(c)(i) and (d)."

4. At the hearing Mr Turner, solicitor, appeared for Mr Pharikan. He also asked the Court to read his affidavit of 29 March 2018.
5. Mr Turner also represented Mr Pharikan in Mr Pharikan's application for review to the Tribunal. He attended the Tribunal hearing in his capacity as his "representative" (migration agent) (CB 236.4). Mr Turner is a registered migration agent (CB 214) and a solicitor (see Mr Turner's affidavit at [1]).
6. Mr Turner sought to give evidence, through his affidavit, in support of ground one of the amended application. The Minister objected to parts of the affidavit. To explain the bases of the Minister's objections, and their disposition, I have reproduced the body of the affidavit as follows:

"[1] I am the Solicitor for the Applicant in these proceedings.

[2] I was present in the hearing of this matter by the Second Respondent on 14 January 2016.

[3] Throughout the hearing, the Member looked away from the Applicant and witnesses, looked only at her computer and continued typing throughout the hearing.

[4] The Tribunal did not look at the Applicant and witnesses while questioning them.

[5] While looking away from the Applicant and witnesses, the Tribunal continually mumbled to the point when the Interpreter was forced to ask her to repeat herself.

[6] Towards the end of the hearing the Tribunal stared at the Applicant in a confronting manner and questioned him in relation to his credibility.

[7] The Tribunal became exasperated with the Applicant's wife while she was giving evidence and displayed displeasure.

[8] The Tribunal continued to type while the interpreter was trying to interpret, to the point that what the interpreter was saying could not be heard.

[9] The Tribunal appeared disinterested in the evidence of the Applicant's daughter.

[10] Annexed hereto and worked with the letter A is a copy."

7. Although the Court did not agree with some of the Minister's objections, the following words were not read into evidence:
 - a) Paragraph 6, the words, "confronting manner". I agreed with the Minister that this was a matter of an impression or opinion.
 - b) Paragraph 7, the word, "exasperated". This was not pressed by Mr Pharikan following the Minister's objection.
8. The Court raised with the parties that [10] of Mr Turners affidavit is incomplete. Nonetheless, the Minister made no objection to it.
9. Mr Turner was cross-examined on his evidence (see further below).
10. It is sometimes the case in various matters before this Court, that solicitors provide evidence by way of affidavit. However, this in great part, involves procedural matters that arise throughout litigation. For example, affidavits of service, or where affidavits are used as a vehicle for putting documents before the Court as background, to enable both parties to proceed with an issue in dispute. A further example is that in migration matters, affidavits are used to identify the existence of a non-disclosure certificate under the Act.
11. It is quite another matter however, for a solicitor who is also appearing as an advocate, to provide evidence central to, and about, a matter in

dispute. That is, the solicitor then becomes not only the advocate of the case, but a witness in the cause. This is what has occurred in the current case.

12. In my view, Mr Turner's filing of his affidavit, in circumstances where he intended to advocate the proceeding on behalf of Mr Pharikan, was inappropriate.
13. This can be illustrated with the following. It is to be remembered that ground one alleges an apprehension of bias in relation to the Tribunal member at the hearing on the review. Mr Turner gave evidence both by affidavit, and orally from the witness box, about what he said were various aspects of the Tribunal member's conduct.
14. During cross-examination Mr Turner was asked whether, given what he said was the Tribunal member's conduct (see further below), he raised with the Tribunal member the difficulties he said were caused by her conduct. His answer was "no".
15. Given the unusual situation of the advocate also being a witness in the cause, there was no one present who could come forward to ask any questions "in reply". For this reason, I gave Mr Turner the opportunity to "clarify" any matter arising during the cross-examination.
16. Mr Turner recalled that he was asked a question about why he did not raise the "issues" (of concern) with the Tribunal member at the hearing. His evidence was, a "solicitor doesn't have a right to make representations to the Tribunal".
17. It must be said, in the circumstances, this evidence was disingenuous. Mr Turner, as the advocate solicitor, had earlier asked the Court to read the affidavit of Mary Elinor Corkhill that attached a transcript of the Tribunal hearing.
18. That transcript plainly reveals that Mr Turner did intervene at certain times during the Tribunal hearing (see T7.5 and T38.10 to T39.3). During his subsequent submissions to the Court, Mr Turner took the Court to parts of the transcript where he did speak (T38 to T39).

19. The dangers of crossing the line between advocate and witness were also revealed in parts of Mr Turner's submissions on behalf of Mr Pharikan.
20. In his submissions, Mr Turner sought to explain his evidence about the "limitations" on agents at the Tribunal hearing. His submission was that even though the agent has no "right" to speak, they can speak if they "want to".
21. In the current case, when Mr Turner (as the migration agent) intervened, (see at T38.10) the Tribunal member responded, "[y]es I am listening" (T39.1).
22. In my view, one of the hallmarks of advocacy before the Court, that also applies to solicitor advocates, is that they maintain a certain level of necessary objectivity so as to act in the best interests of their clients in presenting their case.
23. Blurring the line between advocate and witness, as in this case, leads to unhelpful sophistry. Mr Turner, as agent, may not have had the "right" to speak at the Tribunal hearing, but as the transcript clearly demonstrates, he was able to make a complaint to the Tribunal member during the hearing.
24. It is also of note that there were four other people apart from Mr Turner and the Tribunal member present at various times during the course of the hearing. There were Mr Pharikan, the sponsor (Ms Baramy), his daughter, and the interpreter.
25. For whatever reason, Mr Pharikan, as a party to these proceedings, elected not to give evidence. Nor was any subpoena issued to Ms Baramy, his daughter, or the interpreter, to give evidence about the conduct of the Tribunal member during the hearing.
26. No criticism is made of Mr Pharikan in the circumstances. However, it serves to highlight that there were options available to him other than Mr Turner giving evidence. In any event, the "advocate/witness" difficulty could have been avoided if, in circumstances where Mr Pharikan wanted Mr Turner to give evidence, another lawyer could have represented Mr Pharikan in these proceedings, even one possibly from "Turner Coulson Immigration Lawyers" (CB 226 and CB 239).

27. In that light is necessary to set the relevant test. The test for apprehended bias is now well settled. The test for the apprehension of bias is that a fair-minded lay observer might reasonably apprehend that the Tribunal might not have brought an open mind to the proceedings (*Re Refugee Review Tribunal; Ex parte H* [2001] HCA 28; (2001) 179 ALR 425; (2001) 75 ALJR 982, *MZAEU v Minister for Immigration and Border Protection* [2016] FCAFC 100; (2016) 70 AAR 22, *SZRUI v Minister for immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80 (“SZRUP”), *Minister for Immigration and Multicultural Affairs v SZGMF* [2006] FCAFC 138 and *NADH of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 328, (2004) 214 ALR 264). Further, I note the formulation used by the Full Court in *Minister for Immigration and Citizenship v SZQHH* [2012] FCAFC 45; (2012) 200 FCR 223; (2012) 125 ALD 481 at [37]:

“An administrative decision-maker will be found to have given rise to an apprehension of bias if a fair-minded lay person might think that the decision-maker might not bring a fair and impartial mind to the making of the decision. The hypothetical lay person is an objective observer of the proceedings and will be assumed to be properly informed as to their nature, the matters in issue and the conduct complained of: Re Refugee Review Tribunal; Ex parte H (2001) 179 ALR 425; [2001] HCA 28 at 434-435 ([28]-[29]) per Gleeson CJ, Gaudron and Gummow JJ; NADH of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 214 ALR 264; [2004] FCAFC 328 at 268-269 ([14]-[21]) per Allsop J, with whom Moore and Tamberlin JJ agreed.”

28. Therefore in effect, the assertion is that a fair minded, well-informed lay observer might reasonably apprehend that the Tribunal might not have brought an open mind to the proceedings, or had prejudged the proceedings, or was not open to persuasion. Given that bias is an extremely serious charge to make against an administrative decision maker, the law requires that it must be clearly made and distinctly proved (*Jia Legeng* at [69]).
29. Mr Pharikan’s allegations regarding the conduct of the Tribunal member at the Tribunal hearing, was one of a number of bases on

which the allegation of the apprehension of bias was made. These are addressed below.

30. There were a number of elements that were said to arise from Mr Turner's evidence in relation to the conduct of the Tribunal member at the Tribunal hearing.
31. One, Mr Pharikan submitted that throughout the hearing, the Tribunal member "mumbled". To make good that submission, Mr Pharikan referred to the transcript of the Tribunal hearing, and the many instances of the word "indecipherable" used by the transcriptionist.
32. When pressed by the Court, Mr Pharikan was unable to satisfactorily explain how, in the circumstances, the report of "indecipherable" by the transcriptionist might give rise to a reasonable inference that the Tribunal member was "mumbling".
33. This is particularly so when, in submissions, (albeit in criticism of another aspect of the Tribunal member's claimed conduct), the applicant otherwise pointed to a "note" inserted by the transcriptionist in the transcript as follows (see T21.3):

"[Phinit Pharikan]: ... [Note: this is indecipherable because the Tribunal Member is typing while the interpreter is interpreting]."

34. [A similar "note" appears at T23.4].
35. As the applicant submitted, the Minister made no objection to this "note" (as it appeared in the transcript) being read into evidence, nor did he call Ms Corkhill for cross-examination. While this aspect of Mr Pharikan's submission was made in relation to another aspect of the Tribunal's claimed conduct (see further below), it nonetheless emphasised the weakness in the applicant's submission in relation to "mumbling". Noting of course, that the transcriptionist was not present at the Tribunal hearing. Further evidence would be required to establish that what the transcriptionist said was "indecipherable" from the audio recording of the Tribunal hearing was because the Tribunal member was "mumbling".
36. In any event, the transcript also shows that the evidence of Mr Pharikan, and the evidence of the other witnesses at the Tribunal

hearing, was also subject to the notation, “indecipherable”. This occurs regularly in their evidence. I note in this regard that Mr Turner’s statements at the Tribunal hearing (as migration agent) also bear this description at times (see for example T38.10 and T39.2).

37. On balance, I find the evidence does not establish that the Tribunal member was “mumbling” during the hearing.
38. Two, in his affidavit evidence (at [3]) Mr Turner asserted that, “throughout the hearing, the Member looked away from the Applicant and witnesses, looked only at her computer and continued typing throughout the hearing”.
39. During cross-examination, the word “throughout” was explained to mean “approximately 90 per cent of the time”. However, even on this basis, the difficulty for Mr Pharikan is that there was no evidence whatsoever that even if the Tribunal member was looking away from Mr Pharikan, and the other witnesses, that this was unrelated to the matter before her, or she was not listening to the evidence.
40. The evidence in the Court Book establishes (and confirmed by Mr Turner in cross examination) that the Tribunal hearing was of approximately two and a half hours in duration (CB 236 to CB 238) (I note that there was a short adjournment of the hearing of approximately 10 minutes).
41. The transcript reveals that during the hearing the Tribunal asked questions to which Mr Pharikan and his witnesses appeared to be responsive. There is nothing in the transcript to indicate that they had any difficulty in understanding the questions asked.
42. Further, when the “totality” of the transcript is taken into account, as the Minister urged in his submissions, the Tribunal member’s questions, subsequent to the answers given by Mr Pharikan and his witnesses, were probative of, and flowed from, the answer in relation to the issue being discussed.
43. Remembering again that the test for the apprehension of bias is relevant to the fair-minded, well-informed lay observer. Even in circumstances where that person were to have seen the Tribunal member turning away to look at the computer and “type”, the actual

content of the interactions, as recorded in the questions and answers in the transcript, would reveal that the Tribunal member was listening to Mr Pharikan, his witnesses and the migration agent (Mr Turner), and was responding to their evidence and statements. In other words, the Tribunal member was engaging with Mr Pharikan and others “throughout” the hearing.

44. The one occasion when Mr Pharikan says that he does not understand the question, that question, as transcribed, does not contain the notation “indecipherable” (see T4.9 to T5.1). The Tribunal member rephrased the question and Mr Pharikan answered in a responsive way (T5.2 to T5.3).
45. There is nothing on the evidence to say that Mr Pharikan’s lack of understanding on a “substantive question” (as defined by Mr Turner), was caused by “mumbling” or “indecipherable” questioning of him by the Tribunal member. On the one occasion referred to above at [43], Mr Pharikan plainly heard the question, he simply could not answer it without explanation from the Tribunal member.
46. Three, it was Mr Turner’s evidence that the Tribunal member’s questions “all tailed off into mumbling”, particularly when asking “substantive questions”.
47. Further, in cross-examination, Mr Turner explained that by “substantive questions” he meant questions in relation to the nature of Mr Pharikan’s relationship such as “financial matters” and “household matters”.
48. Ultimately, this complaint appeared to be a specific reference to, or a variation of, the claim regarding the “indecipherable” notation. That is, the submission was that when the Tribunal member asked “substantive questions”, the Tribunal member’s words trailed off at the end of the question, thus making it difficult to understand the question, or even to hear it.
49. As set out above, the direct questions to the witnesses, including Mr Pharikan (and Mr Turner migration agent), and their answers in response, reveal that they responded to the questions asked, or statements made, by the Tribunal member.

50. What Mr Turner failed to grasp, in making his submissions, was that it is one thing for the transcriptionist at some later time to be unable to decipher parts of the audio recording of the Tribunal hearing, and quite another as to whether the participants at the hearing were able to hear the Tribunal member. This can be illustrated with reference to the following (T5.6):

“[Tribunal Member]: (Indecipherable).

[Phinit Pharikan]: I can’t remember.”

51. The question that was “indecipherable” to the transcriptionist (Ms Corkhill) when she was preparing the transcription may have been “indecipherable” to her, but Mr Pharikan gave an answer.
52. The entirety of the transcript provides the basis to say that Mr Pharikan and the witnesses, did hear the Tribunal member’s questions. Ms Corkhill was not at the hearing. Mr Pharikan, the witnesses, and for that matter, the interpreter, were at the hearing. There is no evidence from them to say that they were unable to hear the interpreter. Nor is there any evidence from the interpreter that he/she was unable to hear the Tribunal member, or that the Tribunal member was mumbling.
53. Although Mr Turner gave evidence that the “mumbling” was “inaudible”, and that the “trailing off” of the questions into “mumbling” meant that the end of the questions could not be heard, this is only evidence of what he heard, or did not hear. His evidence says nothing about what Mr Pharikan, the interpreter, and the witnesses were able to hear or not hear.
54. In any event, and ultimately dispositive of this complaint, is that the transcription evidence on which the applicant relies does not support and in fact contradicts, Mr Turner’s recollection of what he said occurred at the hearing.
55. This again illustrates the difficulties faced when a solicitor advocate seeks to enter the case as a witness.
56. On the evidence before the Court, there are a small number of instances where the word “indecipherable” appears at the end of the question by the Tribunal member. I have already addressed the “indecipherable”

and “mumbling” complaint above. In most instances, but in particular in relation to the “substantive questions” about the relationship, what is “indecipherable” appears at the beginning or middle or does not appear at all (see for example at T3 to T6 concerning the financial aspects of the relationship (for the most part the “indecipherable[s]” are in relation to Mr Pharikan’s evidence)).

57. Four, Mr Turner’s affidavit evidence was that toward the end of the hearing the Tribunal member “stared” at Mr Pharikan, and questioned him in relation to his credibility. His oral evidence was otherwise, that when the Tribunal member was asking questions, “she was looking at her computer”. This was said to be other than when the Tribunal member “introduced” the matter and the witnesses.

58. This did not initially arise in Mr Turner’s oral evidence. It is referred to at [6] of Mr Turner’s affidavit. It appears to have also arisen in written submissions (see Mr Pharikan’s written submissions at [9]c.) The written submissions state that “[a]t one point in the hearing, the Tribunal stared at the [a]pplicant in an aggressive manner (Transcript page 37).” This is in contrast to the particulars to the ground which relevantly state:

*“b. The Tribunal stared **at times** at the Applicant and **witnesses**.”*

[Emphasis added.]

59. Mr Turner’s oral evidence was ultimately that the “staring” occurred on one occasion only, and only in relation to Mr Pharikan and not, as set out at particular “b” to the ground, “at times”, or at the other “witnesses”.

60. In submissions, Mr Turner sought to refer to T37, but there is nothing at that part of the transcript to indicate that the Tribunal member was “staring” at Mr Pharikan, or even “staring” in an “aggressive manner” (see above at [56]). I note that at T37 the exchange is between the Tribunal member and Ms Baramy, not Mr Pharikan.

61. Therefore, at its highest, Mr Turner’s oral evidence was that the “staring” was not directed to the witnesses. While his affidavit evidence stated the Tribunal member “stared” at Mr Pharikan, he did not identify in the affidavit where that occurred (in relation to the

transcript). There is no evidence before the Court to support the assertion that the Tribunal member stared in an “aggressive manner”.

62. However, as the Minister submits, even if the Tribunal member “stared” at Mr Pharikan on one occasion, and even if this were some display of impatience or irritation, that is not sufficient to establish bias (*VFAB v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 872 and *SZRUI*).
63. In relation to the “staring”, and even what was said to be the continual looking away, without a video recording such claimed aspects of body language are difficult to make out (*AZAEY v Minister for Immigration and Border Protection* [2015] FCAFC 193; (2015) 238 FCR 341).
64. Even on the basis that the Tribunal member “stared” at Mr Pharikan on one occasion, that does not on its own, or even in conjunction with all the other elements in Mr Turner’s evidence and submissions (on behalf of Mr Pharikan), go anywhere near to revealing an apprehension of bias on the part of the Tribunal member.
65. Five, particular “c” to the ground, asserts that the Tribunal was “disinterested” in what Mr Pharikan’s daughter “was saying”, thereby indicating pre-judgment of the application for review.
66. The part of the transcript relevant to Mr Pharikan’s daughter’s evidence is at T38.5 to T39.4 as follows:

“[Tribunal Member]: ... Your name and date of birth please.

[Ketkanok Pharikan]: Ketkanok Pharikan

[Tribunal Member]: Date of birth please?

[Ketkanok Pharikan]: 27.6.1988

[Tribunal Member]: (Indecipherable) for your father so you will still need to pause after every single (indecipherable). Okay, I don’t have any specific questions for you so it is your opportunity to tell me whatever you think and you know about his relationship.

[Ketkanok Pharikan]: [This is inaudible on maximum volume]! ... been together since I started my job at the airport in 2008. Out and about (indecipherable).

[Tribunal Member]: Do you have much contact with your stepmother?

[Ketkanok Pharikan]: Not really. (Indecipherable)

*[Tribunal Member]: **Is there anything else that you want to tell me about the relationship?***

[Ketkanok Pharikan]: (Indecipherable)

[Tribunal Member]: That is fine. So I don't have any questions for you so if there is nothing else then –

[Agent]: This is actually (indecipherable) of the previous (Indecipherable) –

*[Tribunal Member]: **Yes I am listening –***

[Agent]: Perhaps she – (indecipherable)

[Tribunal Member]: It is not so much the break-up as the (indecipherable) your client's with the department (indecipherable) not sure to what extent that evidence could help me. I accept that there was a break-up of the relationship but it wasn't really my concern.

[Agent]: Okay.

*[Tribunal Member]: **So is there anything else that you think I need to hear? Is there anything else that you would like to tell me?***

Okay. That's fine. You can wait outside."

67. [Emphasis added.]

68. The state of the evidence before the Court does not support the contention made at particular "c" to ground one. Nor did Mr Pharikan's submissions before the Court assist in satisfactorily explaining this complaint.
69. It is of relevance, and importance, to note that the Tribunal asked an open-ended question of Mr Pharikan's daughter at the start of her questioning. The statement "I don't have any specific questions for you so it is your opportunity to tell me whatever you think and you know about his relationship" (T38.6), is hardly an indication of a closed mind.

70. Given, that it was also Mr Pharikan's daughter's evidence that she had "not really" had much contact with her stepmother, it was hardly surprising that the Tribunal member did not have any "specific questions" for her. In any event, there did not appear to be any response to the following question by the Tribunal member (T39.4):

"[Tribunal Member]: So is there anything else that you think I need to hear? Is there anything else that you would like to tell me?"

Okay. That's fine. You can wait outside."

71. "Disinterest" on the part of the Tribunal member is not made out simply on the basis that when given the opportunity, the witness had nothing to say, or chose not to say anything. This was despite the opportunity given to her. It must also be said that this was in circumstances where there was an attempt by the agent (Mr Turner) to intervene and apparently prompt the witness (see below).
72. Despite his evidence that he had no "right" to speak at the Tribunal hearing, Mr Turner did seek to intervene in the questioning during the evidence given by Mr Pharikan's daughter (T38.10). I pause to note here that the transcriptionist reported that Mr Turner's statements were, for the most part, "indecipherable".
73. Six, the particulars to ground one allege that at the hearing the Tribunal was informed that in relation to Mr Pharikan's superannuation nomination (and how such nominations went to the matter of the relationship), there was further information to be provided ("earlier" superannuation nominations and see particular "d" to ground one of the application to the Court).
74. The submission was that the Tribunal "declined" this invitation to give further documentation. The complaint was that in light of its subsequent relevant finding, that declining of the invitation establishes the apprehension of bias. The impugned finding was ([15] at CB 248):

"...the applicant's superannuation is dated December 2015 and is effective from November 2015, well after the parties claim to have commenced their relationship."

75. Before the Court, Mr Pharikan's submissions sought to link the superannuation issue to the claimed "disinterest" on the part of the Tribunal member, in Mr Pharikan's daughter's evidence. This is different to the complaint in written submissions which was that there were documents that could have been provided in relation to earlier superannuation arrangements.
76. The background to this is as follows. Mr Pharikan had been in another relationship prior to the claimed current relationship. The witness, Ketkanok Pharikan, that is, the daughter of Mr Pharikan, is the daughter from that previous relationship.
77. At the hearing, the Tribunal questioned Mr Pharikan about the financial aspects and living arrangements of his current relationship (beginning at T3 and following). The Tribunal put the following to Mr Pharikan (T6.10 to T7.1):

"[Tribunal Member]: You have given me a copy of your superannuation policy which is dated 4th December 2015 this is years after your relationship started and years after you formed the commitment. Why would get the (sic) superannuation you know so late after the relationship and a couple of weeks before the Tribunal hearing?"

78. The following exchange then took place (T7.2):

"[Phinit Pharikan]: Sorry, yes it (indecipherable) started but um (Indecipherable) my wife 100% and every time she is saying that the company asked me to use (indecipherable) details and so I signed the paper and sent it to them and so they sent me this new letter.

[Tribunal Member]: Are you saying to me that three years earlier than 2004 that there is another nomination and that your wife is the beneficiary.

[Phinit Pharikan]: (Indecipherable) my wife's name.

[Tribunal Member]: Sorry, is there an earlier one? Is the (sic) superannuation advice that is February 2015?

[Phinit Pharikan]: Yes.

[Tribunal Member]: I would like to see that please?

[Agent]: There are a lot more documents outside – because I think –

*[Tribunal Member]: **Right why don't you give the papers to your agent and he can have a look at them and I will keep asking you questions.***"

[Emphasis added.]

79. It is to be remembered, again, that ground one is concerned with the apprehension of bias. In that light, the exchange set out above reveals that the Tribunal did not refuse to see the “earlier” documents. To the contrary, the Tribunal member specifically stated that she wanted to see the “earlier” superannuation documents.
80. Mr Turner intervened and said there were “a lot more documents outside”. The Tribunal member told Mr Pharikan, who, after all, was the one giving the evidence, that he should give all the documents to Mr Turner, and he could have a look at them. Presumably to then see if the documents were to be given to the Tribunal.
81. There is nothing in the evidence to suggest that Mr Turner, or Mr Pharikan, subsequently provided the “earlier” documents to the Tribunal. Any omission on their part, given the clear opportunity provided by the Tribunal member, cannot be said in the circumstances to indicate that the Tribunal member had a closed mind. Ultimately, as Mr Pharikan’s agent, Mr Turner’s role was to advise him as to how to present his case to the Tribunal. If there were documents “outside”, and they were relevant to Mr Pharikan’s case, then Mr Turner, as his migration agent, could have advised him to give them to the Tribunal.
82. Seven, the written submissions to the Court appeared to rely on the Tribunal’s reasoning in relation to the matter of superannuation and the “earlier” documents, to assert that the Tribunal’s finding at [15] (at CB 248) demonstrated that the Tribunal “was looking for reasons to affirm the decision” ([11] of Mr Pharikan’s written submissions).
83. This assertion, in the circumstances presented, and in light of the evidence, can only charitably be described as an attempt to invite the Court to conduct impermissible merits review.

84. Paragraph 15 (at CB 248) of the Tribunal's decision record is as follows:

“The Tribunal has considered the parties’ financial arrangements. At the commencement of the hearing the applicant provided to the Tribunal several receipts in joint names (some names appear to have been added after the receipts were issued). The Tribunal is not convinced that such receipts necessarily indicate the couple’s willingness to share resources, as opposed to their willingness to prepare documents for the benefit of the application. The Tribunal notes, for example, that the applicant’s superannuation is dated December 2015 and is effective from November 2015, well after the parties claim to have commenced their relationship and formed a commitment to the relationship. It is unclear why the applicant chose to nominate the spouse on his superannuation policy at that time unless it was done for the purpose of the application. The applicant claims he had an earlier nomination but the one he provided to the Tribunal is dated December 2015. The applicant also presented a number of receipts in joint names for items that are not commonly associated with joint receipts (for example, for the purchase of an oven). Again, the Tribunal is concerned that such documents were obtained solely for the benefit of the visa. The Tribunal is not convinced that such documents truly reflect the parties’ willingness to share their resources. The Tribunal does not consider the documentary evidence relating to finances as probative.”

85. The specific complaint arising from this aspect of the ground appeared to be that it was not open to the Tribunal to make findings about matters earlier than 14 January 2016, that is, the date of the Tribunal's decision.
86. This assertion, if indeed this is what Mr Pharikan sought to press, is unhelpful to his case to say the least.
87. Mr Pharikan, and his current de facto partner (Ms Baramy) claim to have commenced their relationship in 2008 (see dot point 3 at CB 1). It was reasonably open to the Tribunal to consider the matters arising from the entire period of the relationship, and as those matters informed the relevant questions, as at the time of its decision. This is particularly so, given that it was Mr Pharikan who provided the “recent” superannuation nomination to the Tribunal, and indeed now

also complains he was denied the opportunity to give “earlier” superannuation documents.

88. I note, and agree with the Minister’s submission, that it was reasonably open to the Tribunal to consider Mr Pharikan’s evidence in relation to the superannuation nomination form as it related to “all of the circumstances of the relationship”. After all, this was part of the Tribunal’s task (with reference to reg.1.09A(2) of the Regulations and see [29] of the Minister’s written submissions).
89. I further agree with the Minister that it was again reasonably open to the Tribunal to make the adverse finding that it did on the basis of the evidence actually submitted by Mr Pharikan *Re Refugee Tribunal; Ex Parte Aala* [2000] HCA 57; (2000) 204 CLR 82; (2000) 62 ALD 285 at [163] and s.353 of the Act). Again, it is difficult to see how the allegation of an apprehension of bias can be made out in the circumstances.
90. During the course of the hearing I did raise with the parties, the matter of the time taken by the Tribunal to make its decision. On the evidence, the Tribunal made its decision within 54 minutes from the conclusion of the hearing (CB 238 and CB 245).
91. Mr Pharikan did not raise this as an element of his assertion of the apprehension of bias. Nonetheless, I sought submissions from the parties as to whether the timescale was relevant to the consideration of ground one.
92. In my view, it is reasonable to infer that during the hearing the Tribunal member was drafting aspects of the decision record as the evidence emerged. However, again, when regard is had to the entirety of the hearing as set out in the transcript, it cannot be said that this might reveal a closed mind on the part of the Tribunal member. Even if the Tribunal member was drafting part of her decision record during the hearing, this on its own, and in the circumstances set out above, is not sufficient to reveal an apprehension of bias.
93. Although not a part of his written submissions before the Court, Mr Pharikan explained that each of the matters above was not on its own able to establish the apprehension of bias. However, the

Tribunal's conduct should be viewed in its "totality", and this was said to then reveal the apprehension of bias.

94. It must be said that Mr Pharikan's submissions in relation to ground one sought to rely on inferences, and interpretations, which as set out above, were largely not available on the evidence.
95. As the Minister correctly submits, it is rare that an allegation of apprehended bias can be made out with reference to the Tribunal's decision record alone (*SCAA v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 668 at [38] and see [16] of the Minister's written submissions). To the extent that part of Mr Pharikan's ground sought to rely on the reasons given and findings made by the Tribunal, the mere fact of an adverse finding is not, of itself, sufficient that might allow an inference to be drawn of an apprehension of bias. As to his reliance on the transcript, that is addressed above.
96. Even if all of the elements of Mr Pharikan's case to establish the apprehension of bias (as discussed above), are considered in a cumulative sense, then the relevant test is still not satisfied.
97. At best, what remains is that the transcription Mr Pharikan provided was of limited use, given the multitude of "indecipherable" notations which were not only applied by the transcriptionist to the Tribunal member, but to all other participants at the Tribunal hearing.
98. In all, ground one is not made out.
99. Ground two asserts that "[t]he Tribunal applied the wrong test". The particulars state that "[t]he Tribunal was only required to determine whether [Mr Pharikan] and his spouse were in a genuine and continuing relationship at the time of its decision". Yet the Tribunal "referred principally" to matters in respect of which the delegate had "already made a decision". That is, the delegate had already decided that Mr Pharikan and his sponsor were in a genuine and continuing relationship at the time of application.
100. It must be said that the written submissions provided little illumination to the ground. In essence, the complaint there was expressed to be that the Minister had found Mr Pharikan, and the sponsor, to be in a

genuine relationship “at the time they applied for the visas on 9 March 2011”, and at the time the “temporary subclass 820 visa was granted [on] 14 December 2012” ([14] Mr Pharikan’s written submissions). Further, that the Tribunal’s decision was made on 14 January 2016, and that it should not have focused on matters prior to that date. Rather, it should have focused on the situation as at that date.

101. It must also be said that Mr Pharikan’s (through his representative’s) oral submissions before the Court were not helpful, or clear.
102. Some background is necessary. A person who wishes to remain in Australia permanently on the basis of a spousal, or as in this case, de facto relationship with an Australian citizen or permanent resident, must, under the relevant regulatory scheme, apply for both a temporary visa and a permanent visa at the same time. These are described as a “subclass 820” visa and a “subclass 801” visa respectively. If a person is granted a subclass 820 visa, they generally become eligible for the grant of a subclass 801 visa, if they meet all the requirements for that visa two years after the date of having made the combined application for both visas.
103. Mr Pharikan’s submissions were that he had already been granted a subclass 820 visa when the Minister, by his delegate, had found that Mr Pharikan and Ms Baramy had met the requirements of being in a genuine “spousal relationship”.
104. On the evidence before the Court, Mr Pharikan applied for both visas on 10 March 2011 (CB 1). He was granted the subclass 820 visa by a Ministerial delegate on 14 December 2012 (CB 134 to CB 136). The subclass 801 visa was refused on 18 December 2014 by a different Ministerial delegate (CB 189 to CB 193).
105. Before the Court, Mr Pharikan’s submission was that given that he was successful at the “first stage”, the Tribunal’s task was “to review the permanent visa in light of a finding that the temporary visa was granted”. The Tribunal was said to be bound by the “temporary” decision (in context, the decision regarding the subclass 820 visa), because there “[was] no application before the Tribunal in respect of the [subclass] 820 application”. Further, that there was a decision of a delegate of the Minister before the Tribunal, that, at the time that

application was made, Mr Pharikan was in a “genuine ongoing relationship” with the visa sponsor.

106. Mr Pharikan could provide no authority for those propositions. Nor was he able to satisfactorily explain them in light of the regulatory scheme.
107. Mr Pharikan’s submissions failed to take into account, at least, the following important matters. Contrary to his submissions, while Mr Pharikan made a “combined” application for the subclass 820 and subclass 801 visas, they are two separate subclasses of visas. That is, despite there being a combined application form, there are still two separate applications for two separate visas.
108. The relationship between the two subclasses arises from the requirement that to be granted a subclass 801 visa, a person must be the holder of a subclass 820 visa. Given that both visas emanate from circumstances concerning a spousal (or de facto) relationship, it is logical, and efficient, that they both be applied for at the same time.
109. The policy “scheme” of the two visas (the first being “temporary” and the second being “permanent”) is obvious. That is, to enable the claimed relationship to be “tested” over time (two years) to avoid abuse by those who entered into “sham marriages” (or relationships) as a means of obtaining permanent residence in Australia.
110. In the current case, as set out above, Mr Pharikan applied for both visas. He was granted the subclass 820 visa. Two years later he was refused the subclass 801 visa.
111. The decision for review before the Tribunal was the decision made by the delegate on 18 December 2014 to refuse the grant of the subclass 801 visa to Mr Pharikan [I note that the Tribunal states that the delegate’s decision was made on 19 December 2014 (at [1] at CB 246) but see CB 193]. The Tribunal plainly understood this (see [1] – [2] at CB 246). Mr Pharikan’s submission that that the Tribunal was bound by the Minister’s finding (made on 14 December 2012) that Mr Pharikan and Ms Baramy were in a genuine and ongoing relationship, must be rejected.

112. The finding relevant to the Tribunal's task was the finding made by the delegate on 18 December 2014 in relation to the subclass 801 visa. This was that the application for the subclass 801 visa was refused because the delegate was not satisfied that Mr Pharikan and Ms Baramy were in a genuine relationship. Mr Pharikan's submission ignored this critical point.
113. Further, even if this were not the case, the proposition that the Tribunal on review is bound by a finding made by a delegate must also be rejected. The Tribunal was empowered by the Act to exercise all of the powers conferred on the person who made the decision under review (s.349(1) of the Act and *Re Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* [1990] FCA 22 per Gummow J). In the current case, that is the decision made by the delegate on 18 December 2014.
114. Before the Court, Mr Pharikan was unable to satisfactorily respond, when pressed by the Court, as to where the "correct" test may be found. This was in circumstances where the ground of the application to the Court asserted that the Tribunal applied the "wrong test".
115. The answer is that the Tribunal was bound by the relevant requirements of the Act and the Regulations in reviewing the delegate's decision of 18 December 2014. For current purposes, that directs attention to the relevant regulatory criteria for the subclass 801 visa at Schedule 2 to the Regulations.
116. Before the Court, and some way into his submissions on ground two, Mr Pharikan appeared to change his explanation of the asserted legal error.
117. Following attempts by the Court to elicit a clear explanation of the ground, in what appeared to be contrary to what had been submitted earlier, Mr Pharikan then submitted that it was not being put that past events could never be relevant to, or inform the Tribunal's decision. Rather, that the particular matters of the past events that the Tribunal actually considered were not relevant to the regulatory task. This was also not satisfactorily explained.

118. This argument also appeared to rely on the fact that Mr Pharikan had been granted a subclass 820 visa. The argument, said to be put “strongly”, was that the Tribunal was bound by the finding made in relation to the subclass 820 visa (that Mr Pharikan was in a genuine and ongoing relationship with Ms Baramy) because the Tribunal was required to determine whether or not Mr Pharikan was the holder of a subclass 820 visa for the purposes of the consideration of the subclass 801 visa.
119. Plainly, on the evidence before the Tribunal, it would have been unreasonable, and an error going to jurisdiction, for the Tribunal to have found that Mr Pharikan was not the holder of a subclass 820 visa. However, it does not follow that the Tribunal could not look to relevant events in the past, to determine the matters required of it by the Regulations.
120. The Tribunal did have regard to the relevant law. It was correct to find that the criteria relevant to the grant of the visa for which Mr Pharikan had applied, and which was the subject of the relevant decision (18 December 2014) were to be found in Part 801 of Schedule 2 to the Regulations ([5] at CB 246).
121. The Tribunal’s relevant reference to Regulations is as follows ([6] – [8] at CB 246):

“[6] Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse or de facto partner of the sponsoring partner, who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen and was identified in the related Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the ‘sponsoring partner’ of the applicant.

[7] ‘De facto partner’ is defined in s.5CB of the Act and provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live

separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).

[8] In forming an opinion about whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3)."

122. Clause 801.221(2) of Schedule 2 to the Regulations makes plain that a requirement for the grant of the subclass 801 visa, is that at the time of the decision in relation to the subclass 801 visa, the applicant is the "spouse or de facto partner" of the sponsor (cl.801.221(2)(c) of the Regulations), and who was specified in the subclass 820 visa application as the spouse or de facto partner of the applicant, and who continues to be sponsored by them.
123. The relevance of the fact that Mr Pharikan held a subclass 820 visa to the requirements of cl.801.221(2) of Schedule 2 to the Regulations, was that, given that Ms Baramy was the relevant person specified in the subclass 820 visa application, Mr Pharikan met that requirement. That is what the Tribunal properly found ([6] at CB 246).
124. As the Minister's solicitor correctly submitted before the Court, the disposition of that requirement was a matter of fact for the Tribunal to determine. That is, the relevant question raised by the criterion was whether Mr Pharikan held the subclass 820 visa, and not whether he should, or should not, have held it.
125. This is what the Tribunal did at [6] (at CB 246) if its decision record. What follows in the Tribunal's reasoning, which Mr Pharikan sought to impugn, was the Tribunal's consideration of the matters set out at [7] - [8] (at CB 246) of its decision record.
126. Mr Pharikan and Ms Baramy claimed to have been in a relationship since 2008. Given that there was no evidence that they had formally married, the Tribunal was correct to consider the definition of "de facto partner" as it is defined in s.5CB of the Act. Noting that to satisfy cl.801.221(2)(b) and (c) of Schedule 2 to the Regulations, Mr Pharikan would need to continue to be sponsored by the same person, and be in the same relevant relationship. For current purposes, given the

evidence before it, there is no error in the Tribunal's finding that it needed to have regard to the definition of "de facto partner".

127. Section 5CB(1) and (2) of the Act were relevantly in the following terms:

"5CB De facto partner

De facto partners

(1) For the purposes of this Act, a person is the de facto partner of another person (whether of the same sex or a different sex) if, under subsection (2), the person is in a de facto relationship with the other person.

De facto relationship

(2) For the purposes of subsection (1), a person is in a de facto relationship with another person if they are not in a married relationship (for the purposes of section 5F) with each other but:

(a) they have a mutual commitment to a shared life to the exclusion of all others; and

(b) the relationship between them is genuine and continuing; and

(c) they:

(i) live together; or

(ii) do not live separately and apart on a permanent basis; and

(d) they are not related by family (see subsection (4))."

128. Nor is there any error in the Tribunal's finding at [8] (at CB 246) of its decision record that s.5CB(2) of the Act required it to form an opinion as to whether Mr Pharikan and Ms Baramy were in a de facto relationship and this required consideration of all the circumstances of the relationship. This included the matters set out at reg.1.09A(3) of the Regulations.

129. Regulation 1.09A of the Regulations was relevantly in the following terms:

"Reg 1.09A De facto partner and de facto relationship

(1) For subsection 5CB(3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB(2)(a), (b), (c) and (d) of the Act exist.

Note 1: See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2: The effect of subsection 5CB(1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB(2) sets out conditions about whether a de facto relationship exists, and subsection 5CB(3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

(2) If the Minister is considering an application for:

- (a) a Partner (Migrant) (Class BC) visa; or*
- (b) a Partner (Provisional) (Class UF) visa; or*
- (c) a Partner (Residence) (Class BS) visa; or*
- (d) a Partner (Temporary) (Class UK) visa;*

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

(3) The matters for subregulation (2) are:

- (a) the financial aspects of the relationship, including:*
 - (i) any joint ownership of real estate or other major assets; and*
 - (ii) any joint liabilities; and*
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and*
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and*

- (v) *the basis of any sharing of day-to-day household expenses; and*
- (b) *the nature of the household, including:*
 - (i) *any joint responsibility for the care and support of children; and*
 - (ii) *the living arrangements of the persons; and*
 - (iii) *any sharing of the responsibility for housework; and*
- (c) *the social aspects of the relationship, including:*
 - (i) *whether the persons represent themselves to other people as being in a de facto relationship with each other; and*
 - (ii) *the opinion of the persons' friends and acquaintances about the nature of the relationship; and*
 - (iii) *any basis on which the persons plan and undertake joint social activities; and*
- (d) *the nature of the persons' commitment to each other, including:*
 - (i) *the duration of the relationship; and*
 - (ii) *the length of time during which the persons have lived together; and*
 - (iii) *the degree of companionship and emotional support that the persons draw from each other; and*
 - (iv) *whether the persons see the relationship as a long-term one.*

(4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3)."

130. There is nothing in this relevant statutory and regulatory scheme that prohibits the Tribunal from considering past aspects of the relationship. While the primary focus is as at the time of decision, there is nothing to

limit the Tribunal's consideration of past events, as those events may inform the question the Tribunal was required by law to answer as at the time of decision.

131. As the Minister submitted, the words "all of the circumstances of the relationship" as they appear at reg.1.09A(2) of the Regulations, contain no temporal limitation as argued by Mr Pharikan now. In fact, these words make clear that matters such as to how the relationship started, its evolution, and its nature over time, are all part of "the circumstances of the relationship".
132. Nor does reg.1.09A(3) of the Regulations provide for any limitation of the "relevant" circumstances. The Tribunal is required to consider "all the circumstances" by reg.1.09A(2) of the Regulations. While it is compelled by reg.1.09A(3) of the Regulations to consider the matters set out there, the word "including", as it appears at each of reg.1.09A(3)(a), (b), (c) and (d) of the Regulations makes clear that consideration of all the circumstances is not limited to what is set out there (that is, at reg.1.09A(3) of the Regulations).
133. Before the Court, and as set out above, Mr Pharikan sought to impugn the Tribunal's reasoning and findings at [12] (at CB 247) of its decision record. That paragraph is as follows:

"The applicants's evidence to the Tribunal is that his relationship with the former wife broke down in early 2008 and in May 2008 he received the phone call from Immigration. The applicant claims that by August 2008 he was already in a committed relationship with the sponsor. The Tribunal is concerned about the haste with which such relationship developed following the breakdown of the previous one. It appears that, having realised that he was unable to get the partner visa on the basis of the first relationship, the applicant immediately sought to establish another relationship. The Tribunal is concerned that his motivations in doing so was to obtain the Australian visa."

134. The Tribunal's consideration at [12] (at CB 247) plainly comes within the ambit of "all of the circumstances of the relationship" (reg.1.09A(2) of the Regulations). To argue that the Tribunal was estopped from considering past events is contrary to the plain language of the relevant statutory and regulatory scheme.

135. I agree with the Minister that ground two is nothing more than a disagreement with the Tribunal's factual findings and an attempt to seek impermissible merits review. Ground two is not made out.
136. Ground three asserts that the Tribunal failed to consider certain matters that it was "statutorily" required to consider. Specifically, the ground asserts that the Tribunal failed to consider the matters at reg.1.15A(3)(b)(i), reg.1.15A(3)(c)(i) and reg.1.15A(3)(d) of the Regulations.
137. Regulation 1.15A of the Regulations was relevantly in the following terms:

"Reg 1.15A Spouse

(1) For subsection 5F(3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F(2)(a), (b), (c) and (d) of the Act exist.

(2) If the Minister is considering an application for:

(a) a Partner (Migrant) (Class BC) visa; or

(b) a Partner (Provisional) (Class UF) visa; or

(c) a Partner (Residence) (Class BS) visa; or

(d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

(3) The matters for subregulation (2) are:

(a) the financial aspects of the relationship, including:

(i) any joint ownership of real estate or other major assets; and

(ii) any joint liabilities; and

(iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and

(iv) whether one person in the relationship owes any legal obligation in respect of the other; and

- (v) *the basis of any sharing of day-to-day household expenses; and*
- (b) *the nature of the household, including:*
 - (i) *any joint responsibility for the care and support of children; and*
 - (ii) *the living arrangements of the persons; and*
 - (iii) *any sharing of the responsibility for housework; and*
- (c) *the social aspects of the relationship, including:*
 - (i) *whether the persons represent themselves to other people as being married to each other; and*
 - (ii) *the opinion of the persons' friends and acquaintances about the nature of the relationship; and*
 - (iii) *any basis on which the persons plan and undertake joint social activities; and*
- (d) *the nature of the persons' commitment to each other, including:*
 - (i) *the duration of the relationship; and*
 - (ii) *the length of time during which the persons have lived together; and*
 - (iii) *the degree of companionship and emotional support that the persons draw from each other; and*
 - (iv) *whether the persons see the relationship as a long-term one.*

(4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3)."

138. In written submissions, the failure was said by Mr Pharikan to be in relation to reg.1.15A(3)(b)(ii) and (iii) and reg.1.15A(3)(c)(i) and (ii) and reg.1.15A(3)(d)(i) of the Regulations.

139. In submissions before the Court, Mr Pharikan identified the failure contrary to what is set out in the particulars to the ground, and in written submissions, appeared to limit the basis of the ground to matters arising from the transcript of the Tribunal hearing. I therefore understood Mr Pharikan to have abandoned the other particulars. They were clearly not pressed in submissions before the Court.

140. Mr Pharikan referred to two matters arising in the transcript, the first of which was at T41.5:

“[Tribunal Member]: So you need to consider whether you are in a genuine and committed relationship, whether you are living together as partners, whether you have view (sic) your relationship as a long term one.

[Phinit Pharikan]: (Indecipherable)

[Tribunal Member]: Well I am asking for your comments on those things I suppose.

[Phinit Pharikan]: I want this to be a long term relationship.”

141. The second was at T20.7:

“[Phinit Pharikan]: And if I am lucky and if I get the permanent visa then I plan to take her to Thailand to visit my mother who is very old and frail – I am just waiting for that.”

142. Mr Pharikan then referred to the Tribunal’s decision record at [21] (at CB 250) which is as follows:

“The Tribunal is mindful that the parties claim to have lived together for several year and that the sponsor’s two children reside with them. If that is the case, the Tribunal is of the view that they should have better knowledge of such matters, as most relate to daily aspects of their lives. The Tribunal is concerned that the parties’ lack of knowledge of such matters indicates their lack of communication, lack of interest in each other’s affairs and lack of commitment to the relationship. Although the Tribunal is prepared to accept that the parties reside together, the Tribunal is not satisfied that they established a joint household and that they view the relationship as a long term one. The Tribunal is not satisfied that they have sufficient interest in each other and that they provide emotional support and companionship to one another. The Tribunal is not satisfied there is a mutual commitment to the relationship.”

143. The argument was that at no point in its analysis (including with reference to [20] (at CB 250) where the Tribunal considered “living arrangements”), did the Tribunal refer to Mr Pharikan’s and Ms Baramy’s “long term aspirations”. That is, Mr Pharikan’s evidence to the Tribunal of a planned visit to Thailand, and that he wanted the relationship to be “long-term” (see above at [137] – [138]).
144. The submission was that reg.1.09A(3)(d)(iv) of the Regulations required the Tribunal to have regard to the matters arising from the transcript of the Tribunal hearing (as set out above at [140] – [141]).
145. Mr Pharikan sought to rely on the authority of *Truong v Minister for Immigration & Anor* [2018] FCCA 497 (“*Truong*”) at [4], [8] and [20], for the proposition that if a matter is raised, even if “not of great import”, the Tribunal is required to deal with it (*Truong* was concerned with reg.1.15A of the Regulations but Mr Pharikan submitted it was “analogous” to reg.1.09A of the Regulations).
146. In short, Mr Pharikan’s submissions were that he stated his desire for the relationship to be long-term, and that he planned to take Ms Baramy to Thailand to visit his mother if he was granted the permanent residence visa (subclass 801). Regulation 1.09A(3)(d)(iv) of the Regulations required the Tribunal to consider these two matters into account even if they were “not of great import”.
147. In my view, direction for the Court is to be found in the Full Federal Court judgment in *He v Minister for Immigration and Border Protection* [2017] FCAFC 206 (“*He*”). Although *He* also dealt with reg.1.15A of the Regulations, for current purposes, I accept its terms are analogous with reg.1.09A of the Regulations. *Truong* is not binding on this Court, and in any event, it appears it turned on its particular facts.
148. I respectfully understood the Full Federal Court in *He* to find, that given that the Tribunal is required to “consider” the circumstances in (relevantly) reg.1.09A(3) of the Regulations, this means that “the Tribunal is required to make findings upon each of the prescribed matters numbered with Roman numerals” (*He* at [76], and see [71] – [75]). This is so “even if the finding is that no conclusion can be reached on the matter” (*He* at [76]).

149. However, before the Court, the Minister also drew attention to *He* at [79] as follows:

“The Tribunal’s findings upon the matters set out in reg 1.15A(3) are made in the course of making a decision as to whether it is satisfied that the visa applicant and the sponsor are in a ‘married relationship’ within s 5F of the Act. It must be emphasised that there is a distinction between the making of a decision by the Tribunal and the written statement it must give under s 368 of the Act: see Yusuf at [30]; Semunigus v Minister for Immigration and Multicultural Affairs [1999] FCA 422 at [19], approved in Semunigus v Minister for Immigration and Multicultural Affairs (2000) 96 FCR 533; [2000] FCA 240 at [11], [55], [101]; Minister for Immigration and Citizenship v SZQOY (2012) 206 FCR 25; [2012] FCAFC 131 at [40]. The making of a decision involves a mental process. The written statement functions as a record of the Tribunal’s reasons for making its decision. Those reasons provide evidence of the mental process engaged in by the Tribunal. If the written statement does not set out a finding concerning any of the prescribed matters set out in reg 1.15A(3) in Roman numerals, it may (but will not necessarily) lead to an inference that the Tribunal member made no such finding as part of his or her mental process when making the decision. In such a case, the Tribunal will not have complied with its obligation under reg 1.15A(2) to ‘consider’ all of the circumstances of the relationship, including all the matters set out in reg 1.15A(3).”

150. In *He* the Tribunal in that matter had not expressed a finding in its decision record about the pooling of financial resources (with reference to the analogous reg.1.09A(3)(a)(iii) of the Regulations) (*He* at [80]).
151. In that light, the Full Federal Court proceeded to consider whether the applicants in that case had demonstrated that the Tribunal failed to make findings about this. This issue involved matters upon which they relied in the application for the visa.
152. Of current relevance is also what the Full Federal Court found in *He* at [82] as follows:

“The Tribunal’s reasons were not structured in a manner that formulaically addressed each of the relevant matters in turn, but they did not have to be: see Zhang at [20]. Further, as Charlesworth J said in Singh at [20], the impressionistic and evaluative nature of the Tribunal’s task must be taken into account when drawing implications from its reasons, and, further,

such reasons are not to be construed minutely and finely with an eye attuned to the perception of error.”

153. The Full Court considered that despite there being no express findings (in relation to the matters equivalent for current purposes to reg.1.09A(3)(iii) of the Regulations) in the decision record, nonetheless, there was sufficient in the decision record to draw the inference that those matters raised by the applicants in that case had been considered, and relevant findings were made. In those circumstances, no jurisdictional error was revealed (*He* at [83] – [87]).
154. In the current case, there is similarly no express finding in the Tribunal’s decision record about Mr Pharikan’s desire that the relationship be “long term”, or regarding his plan to take Ms Baramy to Thailand to visit his mother.
155. It is to be remembered that the matter that the Tribunal was required to consider, and make findings about, was the nature of Mr Pharikan’s and Ms Baramy’s commitment to each other, and whether they saw the relationship as long-term (reg.1.09A(3)(d)(iv) of the Regulations).
156. For current purposes, [21] - [22] (at CB 250) of the Tribunal’s decision record are relevant:

“[21] The Tribunal is mindful that the parties claim to have lived together for several year and that the sponsor’s two children reside with them. If that is the case, the Tribunal is of the view that they should have better knowledge of such matters, as most relate to daily aspects of their lives. The Tribunal is concerned that the parties’ lack of knowledge of such matters indicates their lack of communication, lack of interest in each other’s affairs and lack of commitment to the relationship. Although the Tribunal is prepared to accept that the parties reside together, the Tribunal is not satisfied that they established a joint household and that they view the relationship as a long term one. The Tribunal is not satisfied that they have sufficient interest in each other and that they provide emotional support and companionship to one another. The Tribunal is not satisfied there is a mutual commitment to the relationship.”

[22] The Tribunal acknowledges that the relationship has been in existence for a number of years. The Tribunal acknowledges that several documents had been submitted with the application, and additional documents to the Tribunal concerning various aspects

of the relationship. In the Tribunal's view, most of such documents would be available whether or not the parties are in a genuine relationship. For the reasons stated above, the Tribunal is not satisfied that the parties have formed a committed relationship. The Tribunal is not satisfied that the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others. The Tribunal is not satisfied that the relationship between them is genuine and continuing."

157. At the Tribunal hearing Mr Pharikan stated his desire ("want") that the relationship be "long-term", and that this could be demonstrated by his plan to take Ms Baramy to Thailand.
158. The Tribunal found that it was not satisfied that the parties' viewed the relationship "as a long-term one" ([21] at CB 250). That is what the Tribunal was required to consider and make a finding about. It did so.
159. In the circumstances, a reasonable inference can be drawn that the Tribunal rejected Mr Pharikan's statements of desire and intention that the relationship was to be long-term.
160. The Tribunal does not have to expressly refer in its decision record to every piece of evidence before it (*Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184; (2003) 236 FCR 593; (2003) 75 ALD 630). The obligation derived from the Regulations in the current case was to consider and make a finding about the nature of the parties' commitment, including whether they saw their relationship as long-term. As is clear from the extracts of the Tribunal's decision record (at [21] – [22] at CB 250) above, the Tribunal did that.
161. That is sufficient to dispose of ground three. However, I note the Minister also made an alternative submission on this point.
162. This was, again drawing on *He*, that having looked at all the other evidence before it, the Tribunal was unable to conclude that Mr Pharikan's intentions, or desires, were a relevant factor to the question of the commitment to the relationship in light of its express finding that the parties did not have a mutual commitment to a shared life. That is, it could not be satisfied that the relationship was genuine and continuing.

163. I agree with the Minister, that in this light, and in the circumstances presented, this is an available alternative reason to find that ground three is not made out.
164. If the relationship is not “genuine” and “long-term”, then Mr Pharikan’s desires are not relevant. I also note, in this context, that the criterion in reg.1.09A(3)(d) of the Regulations involves “the persons” (both) commitment and whether “the persons” (both) “see the relationship as long-term”.
165. Before the Court, Mr Pharikan only pointed to his own statements to the Tribunal in this regard. There was nothing from Ms Baramy on which the applicant sought to rely.
166. In my view, this lends weight to the view that the Tribunal considered, and found (but did not express in its decision record), that it could not determine the matter on the basis of any mutual intention that the relationship be long-term, given the absence of any relevant evidence from Ms Baramy. In all, ground three is not made out.

Conclusion

167. None of the grounds of the amended application are made out. The application is to be dismissed. I will make the appropriate order.

I certify that the preceding one hundred and sixty-four (164) paragraphs are a true copy of the reasons for judgment of Judge Nicholls

Associate:

Date: 8 June 2018